United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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OF THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1906.

403

No. 1625. No. 6, Special Calendar.

AMERICAN GRAPHOPHONE COMPANY, APPELLANT,

vs.

WILLIAM HERBERT SMITH, APPELLEE.

BRIEF FOR APPELLEE.

A. S. WORTHINGTON.
MELVILLE CHURCH.
Solicitors for the Appellee.

LAW REPORTER PRINTING CO., WASHINGTON, D. C.

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Statement of the Case.

In May, 1903, William Herbert Smith, a resident of the District of Columbia, the defendant herein, brought a suit at law in the Supreme Court of the District of Columbia, in his own right, and as assignee of Frank L. Capps and V. H. Emerson, against the American Graphophone Company, a West Virginia corporation, the complainant herein, for royalties claimed to be due under a certain contract between Smith and his assignors and the company, dated June 12, 1899. At the time of the institution of this suit at law the company had its principal office in the District of Columbia and an agent in charge thereof, and process was, without difficulty, served upon its agent. Not only was jurisdiction of the *corpus* of the company secured by such service of pro-

cess, but, in addition, the company formally submitted itself to the jurisdiction by the entry of a general appearance in such action through its attorneys, Philip Mauro, Esq., and Fulton Lewis, Esq., members of the local bar, and by the filing of pleas of *non assumpsit* to the merits.

After issue had been joined, and the cause had been calendared for trial, the defendant company, conceiving that one of its alleged defenses, i. e., the invalidity of the contract declared upon, because of constructive fraud on the part of Smith in its procuration, might not be fully available in the action at law, and also, doubtless, conceiving that a court of equity could more satisfactorily determine and settle all the matters in dispute than a court of law, filed, through its solicitors, Messrs. Mauro & Lewis, who, as we have seen, had appeared as its attorneys in the law case, its bill of complaint on the equity side of the court, in which bill, after setting up the particulars of the alleged constructive fraud, it proceeded to aver (pp. 5, 6)—

> "that the action of said defendant in bringing suit against your orator, as aforesaid, is unconscionable and contrary to equity, inasmuch as the transactions between defendant and your orator, resulting in the purchase by your orator of the said Capps invention, *and the questions in dispute between defendant and your orator, can only be properly reviewed and the rights of the parties adjudged in a court of equity*,"

and praying, among other things (1) that Smith be enjoined from prosecuting his action at law; (2) that the contract of June 12, 1899, be rescinded and canceled; (3) that Smith be ordered to pay to the company the sum of twelve thousand dollars ($12,000) covering the sum of $5,000 alleged to have been paid by the company to Smith and his assignors under the contract, and $7,000

additional alleged to have been expended by the company in its efforts to carry out the contract, and which an accounting would show was chargeable against said Smith, and (4) for general relief.

This bill was subsequently displaced by an amended bill (p. 15), not differing materially, however, from the original in the particulars mentioned.

In its amended bill of complaint filed March 7, 1905, the company represented itself as still "having its principal office in Washington, in the District of Columbia," (p. 15.)

The defendant Smith filed an answer to the company's bill denying the invalidity of the contract, denying specifically the particulars of fraud alleged in the bill, and the right of the company to the specific relief prayed for and to any relief.

On the 14th day of March, 1905, the company, through Messrs. Mauro and Lewis, its solicitors, made a motion in the equity proceeding for an interlocutory injunction against defendant Smith to restrain him "from further prosecuting the suit at law No. 46,209, on the law side of this court" (p. 51.)

This motion coming on to be heard before His Honor Judge Stafford, the latter, on the 20th day of May, 1905, made the followed order (p. 51):

> "Upon consideration of the application of the complainant in this cause for a preliminary injunction, and it appearing to the court that counsel for the defendant make no objection to the granting of a temporary injunction restraining the defendant from issuing execution upon any judgment that may be obtained by him against the complainant in the action at law of William Herbert Smith *vs.* The American Graphophone Company, now pending in the Supreme Court of the District of Columbia, on the law side thereof, being numbered at law 46,209, referred to in the pleadings in this case, and that counsel for the defend-

ant herein further ask that such injunction may be so prepared as to allow the defendant to have tried in said action at law the question whether the molded record process used by the complainant in the manufacture of graphophone records under the patents of Thomas A. Macdonald, referred to in paragraph seven of the amended bill of complaint in this case, is covered by the invention of Frank L. Capps, the application for a patent for which was assigned to the complainant on the 13th day of July, 1899; and it appearing to the court *that this suggestion is opposed by counsel for the complainant on the ground that the equity court having taken jurisdiction of the case should dispose of all of the questions that arise therein; and the court after hearing counsel for the respective parties, being of opinion that all the matters in controversy should be settled in this suit;* it is this 20th day of May, 1905, ordered that the defendant, his agents, attorneys, and assigns be and they are hereby enjoined, pending this suit or until the further order of the court, from further prosecuting said action at law or any other for the same cause of action."

The portion of the above order which we have italicized shows clearly that Judge Stafford, adopting the suggestion of the company's bill, and of the company's counsel, arrested the progress of the action at law in order that "all the matters in controversy should be settled" in the equity suit.

If Smith had contented himself with simply filing his answer to the company's bill of complaint in the equity proceeding, and had prevailed, the maximum advantage accruing to him would have been the dismissal of the company's bill f complaint. But this plainly would not have "settled" the "controversy" between the parties, since the extent of the company's liability to Smith under the contract would still remain to be determined; there would still be no adjudication affirmatively estab-

lishing the validity of the contract; no decree restraining the company from bringing other suits assailing the validity of the contract; and no adjudication that would prevent the invalidity of the contract being asserted by the company every time Smith should thereafter bring suits at law for further unpaid royalties.

It became imperative, therefore, for Smith's complete protection, that he should file a cross-bill, praying affirmative relief in respect of the, to him, vital matters involved in the controversy. This, on the 22d of May, 1905, he did. His cross-bill prayed, among other things (1) that the contract of June 12, 1839, might be adjudged, decreed, and declared to be a good, valid, and subsisting obligation, binding upon all the parties thereto; (2) that the company might be enjoined from bringing any action or suit assailing the validity of said contract and from in anywise controverting or denying the validity of the same; and (3) that an accounting might be had between Smith and the company, and the company required to pay over to Smith the amount that might be found due him in such accounting under the contract, and (4) for general relief (p. 57).

When attempt was made by Smith to serve process under the cross-bill it was found that subsequent to the filing of its bill of complaint the company had closed its office in, and withdrawn its agent from, the District of Columbia, so that personal service upon an agent within the jurisdiction became impossible. Therefore, in accordance with approved practice, a motion setting forth the facts was presented to Judge Stafford for an order for substituted service on the company's solicitors, Messrs. Mauro & Lewis (p. 59) or either of them, which motion was, on the 23d day of June, 1905, granted (p. 61), and service was duly made on Fulton Lewis, Esq., on the 23d day of June, 1905 (p. 62). Subsequently, on the 1st day of July, 1905, a motion was made before His Honor

Judge Anderson to quash the service of this process (p. 62), but was overruled on the 19th day of July, 1905 (p. 63).

From this order refusing to quash the service this special appeal is prosecuted.

ARGUMENT.

I.

What is substituted service?

> "In ancillary or dependent suits in equity in the circuit courts of the United States, such as bills to enjoin the execution of judgments at law obtained in the same court, cross-bills and other bills of a purely dependent and ancillary character, the subpœna issued upon such bills to defendants therein who are parties to the principal or original suit is not regarded as an original process or proceeding, and is not controlled by equity rule 13; and such subpœna may be served upon the defendants in the ancillary bill who are parties to the principal suit, by service upon their attorneys and counsel of record in the principal suit, or upon the party himself outside of the district where the litigation is pending. Thus, in a bill filed in the Circuit Court of the United States to enjoin the execution of a judgment at law obtained in the same court, the subpœna issued upon the injunction bill may be served upon the plaintiff in the action at law by service upon his attorney of record in that action, or it may be served upon the party himself outside of the district where the litigation is pending, and may be served by the marshal of any district where he may be found. In all other suits in equity of a purely dependent and ancillary character, as defined by the adjudicated cases of the federal courts, the parties to the original litiga-

tion may be served with the subpœna issued upon the dependent bill, in the same manner as is allowed in bills to enjoin judgments at law. But before such service can be made, it must be authorized by an order of the court, previously obtained, directing it, and ordering that it shall 'be deemed good service;' such an order is obtained by written motion or petition, stating the facts which authorized it and supported by affidavit."

Bates' Fed. Eq. Procedure (1901), vol. 1, p. 193.

II.

What is a cross-bill?

The Supreme Court of the United States have thus defined it:

"A cross-bill is brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. It is brought either to obtain a discovery of the facts in aid of the defense to the original bill, or to obtain full and complete relief to all parties as to the matters charged in the original bill. It should not introduce new and distinct matters not embraced in the original bill, as they can not be properly examined in that suit, but constitute the subject-matter of an original, independent suit. The cross-bill is an auxiliary to the proceeding in the original suit and a dependency upon it."

Ayers *vs.* Carver, 17 How., 591.

See, also—

Cross *vs.* DeValle, 1 Wall., 5.

Shields *vs.* Barrow, 17 How. 130.

Ex parte Railroad Co., 95 U. S., 221.

Morgan's Co. *vs.* Texas Central R. R., 137 U. S., 200–1.

Carey *vs.* Houston and Texas R. R., 161 U. S., 128.

Bates' Fed. Eq. Proc., vol. 1, p. 426, and authorities cited.

III.

A cross-bill is an ancillary suit.

> "A cross-bill in equity in a circuit court of the United States is not a suit by original process; it is an ancillary suit; the cross-bill is an auxiliary to the original suit and a dependency upon it. The statutes of the United States defining the jurisdiction of the courts, and prescribing where suit shall be brought, do not apply to an ancillary or dependent suit; such suit should be brought in the court wherein is pending the original suit to which it is ancillary and upon which it is dependent, without regard to the citizenship of the parties, or any other ground of federal jurisdiction whatever; the court has jurisdiction of the defendant to the cross-bill by virtue of the jurisdiction acquired over him in the original suit. The plaintiff in the original bill, by filing his suit, comes into court voluntarily, and submits himself and the subject-matter of the suit to the jurisdiction of the court, for the purpose of enabling the court to render a complete decree, and decide upon the rights of all the parties, and to entertain all pleadings and applications and take all proceedings that may be necessary to that end; and the plaintiff in the original bill can not object that the court can not entertain the cross-bill upon the ground that he is not within the jurisdiction of the court and can not be personally served with process."
>
> Bates' Fed. Equity Proc., vol. 1 (p. 433).

Again (p. 427) :

> "It is said in some of the adjudicated cases that the cross-bill must be germane to the original bill; this is only a different mode of stating the principle that the cross-bill should not introduce new and distinct matters not embraced in the original bill, but that it must be restricted to the matters in question in the original bill. The rule does not mean that the cross-bill should state no facts not

stated in the original bill, nor does it mean that the plaintiff in the cross-bill can assert no rights in the subject-matter of the original suit not conceded to him in the original bill; for if such were the meaning of the rule, a cross-bill would be utterly useless and nugatory. All that is required is, that the cross-bill shall not go outside of the matters embraced in the original bill, and introduce new and distinct matters not involved in the original suit. But the plaintiff in the cross-bill may allege additional facts connected with the subject-matter of the original, and may assert any rights he may have in the same arising out of the facts so alleged, and pray for the appropriate relief. While it is true that the cross-bill must grow out of the matter alleged in the original bill, it is also true that the very object and purpose of the cross-bill is to bring the whole matter in dispute before the court, so that there may be a complete decree touching the subject-matter of the suit, and full and complete justice done to all the parties; and if the plaintiff in the original bill does not fully state all the facts and circumstances connected with the subject-matter in controversy, but omits facts which, if alleged, would show a right in a defendant, entitling him to relief against either the plaintiff or a co-defendant, such omitted facts, however extended and voluminous, may be stated by the defendant in a cross-bill, and the appropriate relief demanded; for it is always the purpose of a court of equity to do full and complete justice to all the parties touching the matter in dispute brought before it by the original bill, and to put an end to the litigation; and the court will, of its own motion, in a proper case, direct a cross-bill to be filed, for the purpose of developing the whole case, and showing the rights of all the parties, and enable it to decide upon them and make a complete decree. But the rule is imperative that the new facts sought to be introduced by the cross-bill must be so directly and closely connected with the cause of action set up in the original bill as to render the cross-

> suit a mere auxiliary of the original suit, or a graft upon it. The new facts which it is proper for a defendant to introduce into a pending litigation by means of a cross-bill are such, and such only, as it is necessary for the court to have before it to enable it to do complete justice to all the parties before it in respect to the cause of action on which the plaintiff in the original bill rests his right to ask for relief. The defendant, by his cross-bill, should be permitted to fully develop all the facts of the transaction which constitute the cause of action stated in the original bill, and to assert his rights arising out of such transactions."

IV.

The theory upon which substituted service is allowed under cross-bills is this:

> "Inasmuch as a cross-bill is an ancillary and dependent suit, the subpœna to appear and answer such bill is not, in the courts of the United States, regarded as an original process or proceeding, and does not come within the provisions of the judiciary act, requiring that a party sued must be served personally with process in the district in which the suit is brought; nor is the service of such subpœna regulated by Equity Rule 13, directing the manner of the service of the subpœna upon original bills. But substituted service of the subpœna may be made upon the counsel of record of the plaintiff in the original bill, and defendant in the cross-bill, or it may be served upon such plaintiff in the original bill outside of the district in which the suit is pending. In order, however, to a substituted service, there should be a previous order of the court authorizing it."
>
> Bates' Fed. Eq. Prac., vol. 1, p. 434.

Substituted service under a cross-bill was allowed by Judge Acheson in Johnson R. Signal Co. *vs.* Union Switch

& Signal Co., 4 Wash.; 43 Fed. Rep., 331; recognized as proper by Judge Washington in Ward *vs.* Sebring, 472; Fed. Case, 17, 160; and in Eckert v. Bauert, 4 Wash., 370; Fed. Cases 4, 266; by Judge Billings in Oglesby *vs.* Althill, 12 Fed. Rep., 227; and by Judge Brown in Brown *vs.* Christian, 16 Fed. Rep., 729; allowed by Judge Colt in Gregory *vs.* Pike, 29 Fed. Rep., 588; discussed and approved by Judge Putnam in The Eliza Lines, 61 Fed. Rep., 308.

In Johnson Railroad Signal Company *vs.* Union Switch & Signal Co. (*supra*), Judge Acheson said:

> "The defendant in the cross-bill (plaintiff in the original), being a corporation of the State of New Jersey, and having no agent or representative in this judicial district, other than its solicitor in this suit, an order for substituted service, as respects the cross-bill upon him, is sought. The application is resisted upon the ground of the alleged invalidity of such service, and several English decisions are produced to sustain the objection. But I find it laid down in Conkling's Treatise on U. S. Courts, that, where a non-resident has instituted a suit in equity, and a cross-bill is filed by the defendant in the suit, the court, upon motion, will order that service of the subpœna upon the solicitor of such non-resident party shall be sufficient (p. 143). Certainly this practice had the sanction of Judge Washington (Ward *vs.* Sebring, 4 Wash. C. C., 472), and in Rubber Co. *vs.* Goodyear (9 Wall., 807), such substituted service is impliedly recognized as good in a proper case. Why should it not be so held? A cross-bill is a mere auxiliary proceeding, offered for discovery, in aid of the defendant against the original bill, or to procure a more complete determination of the matter already in litigation in the court, or for both these purposes (Daniel, Ch. Pr., 1653). In Ayers *vs.* Carver, 17 How., 591, 595, the court quotes the declaration of Lord Hardwick that 'both the original and the cross-bill constitute but one suit, so intimately

> are they connected together.' I have not been referred to any American decision adverse to this motion, and such investigation as I have been able to make leads me to the conclusion that the substituted service here asked for is in accordance with precedents of long standing in the English Courts of Chancery."

V.

The cross-bill in this case answers every requirement of the definition of a cross-bill. It seeks relief in respect of the same matters set up in the original bill of which it is a dependency.

(*a*) The bill asserts that the contract is invalid and prays that it may be set aside; the cross-bill asserts the validity of the contract and prays that it may be decreed to be a valid subsisting obligation.

(*b*) The bill prays that Smith may be enjoined from asserting any rights under the contract; the cross-bill prays that the company may be enjoined from asserting the invalidity of the contract, and from denying the rights of Smith thereunder.

(*c*) The bill prays for an accounting and for a money recovery against Smith growing out of the contract; the cross-bill joins in the prayer for an accounting and asks a money recovery against the company under the contract.

(*d*) The bill prays for all general relief that may be grantable under the circumstances of the case; and the cross-bill does the like.

But if there were anything improper in the cross-bill, that would not vitiate the service of process in question, so long as the cross-bill were otherwise good. The improper matter could be reached by a demurrer, at the proper time.

VI.

That a cross-bill is a proper mode of defense to a suit

to set aside a contract or agreement and the only sort of pleading available to secure the affirmative establishment of the validity of the contract or agreement attacked, can not be questioned.

> "Where a bill is filed to set aside an agreement or conveyance, the conveyance can not be confirmed and established without a cross-bill filed by the defendant.
>
> "The defendant may rely upon matters purely legal, connected with the matters of the bill for his defense, and, by his cross-bill, require the plaintiff to answer thereto.
>
> "It seems that a cross-bill is always necessary, where a defendant is entitled to some positive relief, beyond what the scope of the plaintiff's suit will afford him."
>
> 3 Daniel's Chan. Pl. & Pr. (1st Am. Ed., by Perkins), p. 1744.
>
> Carnochan *vs.* Christie, 11 Wheat., 445.
>
> Chicago, M. & St. P. Ry. Co. *vs.* Third Nat. Bk., 134 U. S., 276.
>
> Springfield Milling Co. *vs.* Barnard & Leas Mfg. Co., 81 Fed., 261.
>
> LeDow *vs.* E. Bement & Sons, 66 Fed. Rep., 198.

In the case last above cited (La Dow *vs.* E. Bement & Sons), a bill was filed to cancel certain licenses ~~being~~ given under certain patents, fraud in the procurement of the licenses being charged. The defendant in the original suit filed a cross-bill praying that the licenses in question be declared valid, and that the complainants in the original suit be directed to account for and pay over the royalties due on such licenses.

Judge Coxe held the cross-bill to be good.

In Springfield Milling Co. *vs.* Barnard & Leas Mfg. Co., 81 Fed. 261 (supra), the Circuit Court of Appeals for the 8th circuit, in a luminous opinion by Judge Sanborn, sets

forth the proper office of a cross-bill, and discusses the authorities sustaining the propriety of cross-bills like the one involved in this case. The opinion is too long to quote in full, and its careful examination by this court is requested.

We have carefully examined all of the authorities cited on appellant's brief, and find none of them holding that a cross-bill such as exhibited by Smith herein is open to any objection, and none holding that substituted service under such a bill is ineffectual to hold the defendant in the cross suit.

In This Case the Suit at Law, the Bill in Equity, and the Cross-Bill Constitute But One Proceeding and Are to Be Treated as a Unit.

VII.

However the matter may have been treated anciently, it is now settled that, in Federal practice, a bill in equity filed on one side of a Federal court to enjoin proceedings in an action at law brought on the other side of the court is not to be regarded as an independent proceeding, but merely as an auxiliary or adjunctive proceeding, constituting, in effect, an integral part of the original suit at law.

Mr. Justice Story, on the circuit, said, as early as Dunlap *vs.* Stetson, 4 Mason, 349; Fed. Case No. 4164:

> "I believe the general, if not the universal, practice has been to consider bills of injunction upon judgments in the circuit courts of the United States, not as original, but as auxiliary and dependent suits, and properly sustainable in that court which gave the original judgment and has it completely under its control. The court itself possesses a power over its own judgments by staying execution thereon; and it would be very inconvenient if it did not possess the means of rendering such further redress as equity and good conscience required."

Judge Blatchford, on circuit, made the following observations in The Cortes Co. *vs.* Tannhauser, 9 Fed. Rep., 226:

> "It is a well settled principle that a bill filed on the equity side of the court to restrain or regulate a judgment or suit at law in the same court is not an original, but an ancillary and dependent bill, and supplementary merely to the original suit; and that such bill can be maintained in a Federal court without reference to the citizenship of the parties. On this principle, the suit in equity not being an original suit, the process or notice issued on its being brought, to advise plaintiff in the suit at law that it has been brought, is not regarded as original process or as an original proceeding. Such plaintiff is in court, voluntarily, for the purpose of prosecuting his suit at law and obtaining a judgment, and thereby makes himself subject to any control the court may find it equitable to exercise over his suit at law and over the matters involved in it, to the extent of perpetually staying its prosecution, if, on equitable considerations, that ought to be done. All that is requisite is that the plaintiff in the suit at law should have notice from the court of the institution of the proceedings in equity. If he will not defend against it after receiving such notice, he will have to submit to a stay of his suit at law, if, after an *ex parte* hearing, the court shall deem such stay proper. He is in court for the purposes of the action of the court on the subject-matter of the proceeding in equity, by having become the plaintiff in the suit at law. He is represented, for the purpose of giving notice to him, of the institution of such proceedings, by his chosen attorney in the suit at law. This is a necessity. His residence may be unknown, or if known, remote. His attorney is presumed to know how and where to communicate with him. Therefore, it is proper to give such notice to the attorney and it is the duty of the attorney to bring such notice to the attention of his client. . . .

> A subpoena or notice issued on the filing of such a bill as those in the present suits has never been regarded in the courts of the United States as an original process or proceeding, and has been allowed to be served on the attorney for the plaintiff, in the suit at law, and even to be served on such plaintiff out of the district."

The Supreme Court of the United States, speaking through Mr. Justice Miller, in Minnesota Co. *vs.* St. Paul Co., 2 Wall., 609, said (p. 633):

> "It is objected that the present bill is called a supplemental bill, and is brought by a defendant to the orginal suit, which is said to be in violation of the rules of equity pleading; and that the subject matter and the new parties made by the bill, are not such as can properly be brought before the court by that class of bills.
>
> "But we think that the question is not whether the proceeding is supplemental or ancillary or is independent and original, in the sense of the rules of equity pleading; but whether it is supplementary and ancillary or is to be considered entirely new and original, in the sense which this court has sanctioned with reference to the line which divides the jurisdiction of the Federal courts from that of the State courts. No one, for instance, would hesitate to say that, according to the English chancery practice, a bill to enjoin a judgment at law, is an original bill in the chancery sense of the word. Yet this court has decided many times, that when a bill is filed in the Circuit Court, to enjoin a judgment of that court, it is not to be considered as an original bill, but is a continuation of the proceeding at law; so much so, that the court will proceed in the injunction suit without actual service of subpœna on the defendant, and though he be a citizen of another State, if he were a party to the judgment at law."

See, also,

Krippendorf *vs.* Hyde, 110 U. S., 276.
People's Bank *vs.* Calhoun, 102 U. S., 256.
Webb *vs.* Barnwell, 116 U. S., 193.
Pacific R. R. Co. *vs.* Mo. P. R. R., 111 U. S., 592.

VIII.

Under the authorities cited in the last preceding paragraph, it is perfectly clear that had Smith been a *non-resident*, substituted service of process under the company's bill in equity might have been made on his attorneys in the law suit, notwithstanding the fact that the company's bill was, according to ancient chancery practice, an original independent bill, because, in Federal practice, the equity proceeding is regarded as merely ancillary to and in effect an integral part of the original suit at law, and not independent thereof.

The company's bill being, then, an integral part of the proceedings at law, Smith's cross-bill, which, in the nature of things, is auxiliary to and not independent of the company's bill (Morgan Co. *vs.* Texas Central Ry., 137 U. S., 200–1), must also be considered a part of the original suit at law; and, in fact and in truth, it is so, for in it Smith asks, on the equity side of the court into which he has been forced against his will by the action of the company, the same relief against the company that he originally asked in his suit at law.

Having invoked the aid of the equity side of the court and obtained therein an injunction restraining the prosecution of the action at law in order that "all matters in controversy should be settled in this suit" (p. 52), and having been represented both in the proceedings at law and in the proceedings in equity by the same counsel, fully authorized to both defend and prosecute its rights in respect of "all matters in controversy" between the

parties, the company is now in no position to deny either the jurisdiction of the court of the subject-matter of the litigation, nor the court's jurisdiction of its *corpus*, but is estopped both in law and in morals from doing either of these things.

P. W. & B. R. R. Co. *vs.* Howard, 13 How., 337–8.
Davis *vs.* Wakelee, 156 U. S., 680.
Michaels *vs.* Olmstead, 157 U. S., 201.
Electric Co. *vs.* Dow, 166 U. S., 492.
Hubbell *vs.* U. S., 171 U. S., 209.

IX.

It is, of course, unnecessary to argue the fundamental proposition that a court of equity, having obtained rightful jurisdiction of the parties and the subject-matter, will retain it until complete relief is afforded within the general scope of the subject-matter of the suit.

Hepburn *vs.* Dunlop, 1 Wheat., 179.
Ober *vs.* Gallagher, 93 U. S., 199.
Ward *vs.* Todd, 103 U. S., 327.

X.

If in the equity proceedings instituted by the company in the court below the relief prayed by Smith's cross-bill can not be granted, Smith can not obtain affirmative relief from a court of equity anywhere.

Should he proceed to enforce his contract against the company by bill in equity filed in West Virginia, where the company is incorporated, the bill would be dismissed on the ground that his contract is enforceable at law. Should he then proceed at law, a bill would be filed to enjoin the prosecution of the law suit, and the present situation, in this jurisdiction, would be duplicated.

The company's contention, then, involves this absurdity: Smith may not proceed against the company at

law, because to do so would deprive the company of its defense of constructive fraud; but the company may, by a suit in equity, enjoin the prosecution of the law suit, compel Smith to litigate the company's defense of constructive fraud in that equity suit, and *prevent Smith from litigating anything else in that suit, or elsewhere!*

In whatever aspect the substituted service of process in this case is viewed, whether as a service of process under a cross-bill, *simpliciter*, upon the solicitors of the non-resident complainant in the original bill, of which the cross-bill is a dependency, or as a service of process under a cross-bill considered merely as an integral part of a single litigation in respect of unitary subject-matter between the same parties, reaching back to the original law suit (which was the view of the court ~~here~~ below), the service upon the appellant company was a good and valid service, conveying to the company all to which it was entitled, NOTICE, and, so regarded, the order of the court below was right and should be affirmed.

A. S. WORTHINGTON.
MELVILLE CHURCH.
Solicitors for the Appellee.

WASHINGTON, D. C., *January 2, 1906.*